United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7207

United States Court of Appeals

For the Second Circuit

Docket No. 76-7207

PRUDENTIAL OIL CORPORATION,

Plaintiff-Appellee,

—against—

PHILLIPS PETROLEUM COMPANY,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Table of Authorities

A. Cases

B. Statutes and Rules

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REPLY BRIEF OF DEFENDANT-APPELLANT

Phillips Petroleum Company ("Phillips"), the defendant-appellant, submits this brief in reply to the brief of plaintiff-appellee, Prudential Oil Corporation ("Prudential").

Summary

Plaintiff's answering brief proclaims this a "simple case" (p. 1) and then devotes more than 50 type-written pages to avoiding and obscuring the decisive issues on this appeal. The answering brief is, nonetheless, pertinent, for by its explicit admissions, and concessions by silence, plaintiff undermines the grounds on which it attempts to sustain the verdict below.

The central and critical omission in plaintiff's brief is its silence concerning the Mohawk deposition testimony (Tr. 513-521, E-1801) of Nathan M. Shippee, chairman of plaintiff's predecessor. On December 29, 1965, Mr. Shippee testi-

fied in connection with an action* filed in the Southern District that after an airplane accident in July 1963, he was unable to continue with the promotion of a Puerto Rican refinery project with Phillips—the claim on which the present action is based—and that in his absence the interested parties, essentially the Commonwealth of Puerto Rico, turned to others. (Tr. 518-21, E-1814-17)

In spite of this testimony on December 29, 1965, Shippee had two weeks earlier, on December 13, 1965, written to the President of Phillips, Stanley Learned (E-1864), and purported to accept the proposal (E-998) made more than 3 years earlier by Phillips to assist Shippee and his associates in attempting to develop a refinery project for Puerto Rico. (Throughout the course of this litigation Prudential has relied on this 1962 offer as the basis for its purported joint venture with Phillips. (E-998; complaint, A-20)) Thereafter, in the early months of 1966, Shippee attempted to gain Phillips' recognition of his company, Prudential Oil Corporation—a Delaware corporation ("Prudential Delaware")—as a "joint venture" party in Phillips' Puerto Rican project, and in a further attempt to enforce such demands, in May 1966 exhibited to Phillips' President and General Counsel a draft complaint (E-1828) against Phillips for breach of an agreement of joint venture with respect to Phillips' Puerto Rican project. The suit was to be brought in New York State Supreme Court; inasmuch as both Phillips and Prudential Delaware were Delaware corporations (as alleged in the draft complaint), no basis for federal jurisdiction existed. Phillips rejected Shippee's demands by letter dated June 9, 1966. (E-1051)

Thereafter, on July 13, 1966, the claims in suit were assigned to plaintiff, a New York corporation, whose only

* *Shippee* v. *Mohawk Airlines*, 64 Civ. 2105 (1964).

officers were Shippee and his secretary, and whose only asset and business were the prosecution of the claims asserted in this lawsuit. (Stip. Facts, A-36, Answers to Interrogatories 3(a)-(e), 4, and 18, sworn to April 26, 1971, A-103-04, 111)

In September 1967 the complaint in the present action was filed, alleging that Prudential, as the leading promoter, was entitled to the entire equity interest in Phillips' Puerto Rican facility. (complaint, par. 36, A-15) In December 1967 Shippee's action against Mohawk—which asserted a claim of $1.5 million based on Shippee's *inability* to develop and promote a Puerto Rican project with Phillips—was marked settled. (Tr. 530) Shippee did not disclose this conflicting testimony and apparently did not even advise his trial counsel in this action. (Tr. 528-30) It was only through the independent investigation of Phillips and its counsel that Phillips in April 1975 was able to obtain a transcript of the testimony.

Shippee's Mohawk testimony serves as a prism to focus and resolve the conflicting contentions of the parties concerning the verdict below. Phillips' main brief on this appeal emphasized the significance of the Mohawk testimony, and Shippee's subsequent manipulation of inconsistent proceedings in the District Court (Br. 12-13, 27-28, 39). Because plaintiff had no answer to this, it attempted none in its responding brief, and studiously avoided any mention of the Mohawk deposition and the events that surrounded it.

The Mohawk deposition confirms, however, that (1) the dominant if not exclusive motive of assignment of the claims in suit was to acquire federal jurisdiction collusively, and that plaintiff has improperly exploited such jurisdiction by the maintenance of inconsistent litigation in the

same federal court; and (2) prior to filing this action, plaintiff viewed its role with regard to any Puerto Rican project as exclusively that of a promoter-manager, and that its claim to have developed any "concepts" of use or value for the design and development of such a project was an afterthought, advanced for the first time in this litigation.

ARGUMENT

POINT I

The Collusive Assignment of the Claims in Suit, and Improper Manipulation of Litigation in the District Court, Is Clearly Established on the Record Below

1. *The Pertinent Facts*

Plaintiff contends that "[t]here is not a *scintilla* of evidence that any motive of the assignment in question was to create federal jurisdiction" (Br. 23-24) and also asserts that there is not "one shred of evidence that jurisdiction was created collusively." (Br. 20) These bald assertions conveniently overlook the Mohawk deposition testimony of Nathan Shippee on December 29, 1965 (Tr. 513-21, E-1801), the draft state court complaint against Phillips which Shippee exhibited to its senior officers in May 1966 (E-1828), Phillips' rejection in June 1966 of any claim of Shippee to share or participate in Phillips' Puerto Rican project (E-1051) (a position fully in accord with Shippee's testimony of December 28, 1965), and the assignment of the claims in suit by Prudential Delaware to plaintiff, a wholly-owned subsidiary, one month later. (Stip. Facts, A-36-38)

Further, the collusive purpose of the assignment should be evaluated in light of Shippee's manipulation of litigation in the District Court pursuant to that assignment. As noted

above, Shippee in December 1965 asserted as the basis for a $1.5 million claim against Mohawk Airlines (the amount of the jury's verdict in the present case), that after July 1963 he was unable to participate as a promoter-manager in Phillips' refinery project for Puerto Rico. In contrast, the present action filed in the District Court in September 1967, Shippee with his associates Willey and Young claimed as their promoters' share the entire equity interest in the petrochemical facility which Phillips was then constructing in Puerto Rico. (complaint, par. 36, A-15)

The Mohawk litigation was marked settled in December 1967. (Tr. 530) Despite the flatly inconsistent nature of the claims asserted in the two actions pending at the same time in the same Court, Shippee at no time disclosed the pendency of the other action, or the fact that each action was premised on substantial claims that were directly inconsistent with one another.

The assignment of claims from a parent corporation to a subsidiary, in contemplation of litigation, at a time when inconsistent litigation was being prosecuted in the same court, effectively answers plaintiff's assertion that there is not one "shred" or "scintilla" of evidence suggesting collusion on this record. The only effect of the assignment was to make federal diversity jurisdiction available, and that was its overriding purpose.

2. *The Applicable Law*

In addition to its disregard of the directly pertinent jurisdictional facts, plaintiff obscures the legal standard applicable to those facts by asserting that under 28 U.S.C. § 1359 a single test governs the validity of all assignments —regardless of the relationship of assignor and assignee. Rather, the pertinent standard here is that applicable to *inter-corporate* assignments between related corporations,

where prior to the assignment no federal jurisdiction existed, litigation is contemplated with respect to the claims assigned, and no substantive change of interest is effected by the assignment.

Because an assignment of claims between related corporations effects no substantive change of interest, and can easily be undone after the close of litigation, the Court in *Green and White Construction Company, Inc.* v. *Cormat Construction Co.*, 361 F. Supp. 125 (N.D. Illinois 1973), properly held that a strict test of objective necessity was required to justify such an assignment under 28 U.S.C. § 1359:

> "While it is conceivable that a subsidiary could prove that an assignment was made to its parent, or vice versa, for legitimate commercial reasons independent of the desire to litigate in a federal court, it must bear a heavy burden of proof since the close relationship between parent and subsidiary *necessarily presents opportunities for the collusive manufacture of such reasons.*" 361 F. Supp. 128 (emphasis added)

The rule requiring strict scrutiny of *inter-corporate* assignments which effect no change in interest has been further extended to cases where the assigning corporation dissolves following the transfer, where, as is true in the present case, nothing but a naked claim is assigned. *Compare Greater Development Company of Connecticut* v. *Amerlung*, 471 F.2d 338 (1st Cir. 1973) with *Black and White Taxi Cab Co.* v. *Brown and Yellow Taxi Cab Co.*, 276 U.S. 518 (1928).

Because plaintiff disregards this distinct and strict standard applicable to inter-corporate assignments, its discussion of the applicable law is inapposite. With one ex

ception, the cases cited by plaintiff which were decided after the controlling decision of the United States Supreme Court in *Kramer* v. *Carribean Mills,* 394 U.S. 823 (1969), do *not* involve inter-corporate assignments.* Plaintiff does cite *Green & White Construction Co., supra,* 361 F. Supp. 125, for the proposition that "an assignment for legitimate commercial reasons would be valid" (Br. 22), but overlooks the more specific and stringent standard which the court applied to find invalid the inter-corporate assignment there involved. *See Farrell* v. *Ducharme,* 310 F. Supp. at 258, n.2, and Phillips' Brief, pp. 24-27.

Plaintiff's reliance on the earlier and separate reorganization of Prudential Delaware's drilling fund business —as a purported justification for the subsequent intercorporate assignment of the claims in suit—is also erroneous. The particular purpose of the reorganization—*i.e.,* the isolation of the drilling program to facilitate a possible future public offering of its shares (see plaintiff's brief, p. 14)—was accomplished by the establishment of Prudential Funds, a wholly owned subsidiary of Prudential Delaware, to which the drilling business was transferred in June 1966, prior to the assignment of the claims in suit (Stip. Facts, A-33-34). The actual public offering of shares by the subsidiary—allegedly contemplated by this 1966 reorganization—did not take place until 1968. (Affidavit of Nathan M. Shippee, sworn to April 30, 1975, A-255-56)

Even assuming that the separation of the drilling fund business into a single subsidiary in June 1966 was actually undertaken to facilitate the December 1968 public offering of stock by that subsidiary, it obviously does not follow that

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* *Saalfrank* v. *O'Daniel,* 390 F. Supp. 45 (N.D. Ohio 1975), *Aanestad* v. *Air Canada, Inc.,* 382 F.Supp. 550 (C.D. Cal. 1974), *Farrell* v. *Ducharme, 310 F. Supp.* 254 (D. Vt. 1970), (Br. 33-34).

the further assignment of the claims in suit by Prudential Delaware to another subsidiary was in any way connected with the public offering. In fact it was not so connected, except by imaginative interpretation of events for the purpose of sustaining federal jurisdiction.

The assignment of the claims in suit to the plaintiff would have been justified, on the basis of independent commercial reasons, only if the public offering by the drilling fund subsidiary would have been affected by its parent's retention and prosecution of the claims. On this question, the opinion of the court below (A-483, 490), and the plaintiff's answering brief (p. 16) are completely mistaken in suggesting that there would have been any necessity for the drilling funds subsidiary to value an asset of its parent, i.e., the claims involved in this lawsuit, for the purpose of the subsidiary's financial statements, or to make any other disclosure with respect to that asset of the parent in connection with the offering of the subsidiary's shares to the public. There appears to be no basis in the securities laws, and plaintiff has pointed to none, which requires the disclosure by a subsidiary of such an asset of a parent corporation. Even assuming that there were a disclosure obligation with respect to such an asset of the parent, the test of materiality applicable to such disclosure is unrelated to whether the asset was held and the lawsuit prosecuted by Prudential Delaware or by its wholly owned shell subsidiary.*

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* The December 13, 1968 Prospectus (A-391) for the public offering of shares by Prudential Funds did not include the financial statements of its parent and the financial statement of the parent would not have been required to be included in such Prospectus, nor would any other disclosure with respect to such asset have been required to be set forth in such Prospectus, if the parent had retained and prosecuted the claims in suit.

POINT II

Plaintiff's Concepts, If Any, Were Without Utility and Were Not Used by Phillips

Plaintiff's answering brief removes an essential element which supported its claim of misappropriation of business concepts before the District Court and jury.

Phillips' main brief recognized the "adverse fact that a brochure which it utilized at one time in its Puerto Rican project incorporated introductory sentences from an earlier brochure of Nathan Shippee and his Prudential associates." (Br. 32) Plaintiff in the court below had paraded before the jury a large scale reproduction comparing these duplicated and similar sentences, and told the jury "that brochure [E-331] . . . is the smoking gun. That shows where they got their ideas, because they lifted some sentences." (Tr. 2175) In this Court, plaintiff's brief concedes that "Prudential does not claim that those particular sentences contained the concept stolen by Phillips from Prudential."* (Br. 10) Rather, according to plaintiff, "the point is that such verbatim copying proves conclusively both access by Phillips to Prudential's brochures and Phillips' intent to make use of Prudential's previous work." (Br. 10) However, in view of this necessary concession that the copied sentences do not contain plaintiff's concepts, the record provides no support for the jury's finding that Phillips used any material of plaintiff's—other than the copied sentences.

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* The prejudice of presenting such an exhibit to the jury—which plaintiff concedes did not contain its concepts—was aggravated by plaintiff's inflammatory closing statement—which described Phillips and its associates as "vultures" who had taken plaintiff's work (Tr. 2166-2168), suggested that Prudential was like a man "whose throat had been cut" (Tr. 2184), and characterized the quota which Phillips gained for its project as a " 'license to steal' " (Tr. 2190). For a jury to identify plaintiff's concepts and determine whether Phillips made any actual use thereof is a difficult task at best. We submit that the above inflammatory and prejudicial presentation to the jury severely compromised its ability to determine these questions accurately and dispassionately.

Plaintiff's alleged concepts for a Puerto Rican project are set forth at pages 6-7 of its brief, and the statement itself exhibits their ephemeral and insubstantial nature.* However, plaintiff's brief is helpful in one respect in that it identifies the problem which, according to plaintiff, these concepts were intended to solve, and thus provides a standard for judging whether, according to plaintiff's own view of the matter, its concepts in fact made any contribution to the establishment of Phillips' Puerto Rican project.

According to plaintiff's statement of the problem, "the way Brown and Chapman (Tr. 1839) envisioned the project, a prior commitment from at least one chemical manufacturer would be a necessary precondition to applying for or obtaining an import quota. Moreover, the 'satellites', the plants using the petrochemicals produced by the 'core' refinery, would have to be built at the same time as the core refinery. Otherwise, Brown and Chapman believed, the import quota would not be granted (Tr. 1831-32, 1939)." (Br. 3, *cf.* Tr. 2147-49)

According to plaintiff (Br. 6) Prudential thereafter proposed an alternative to the approach thought necessary by Chapman and Brown, an alternative, Prudential asserts, which was capable of overcoming the difficulty which had frustrated the initial efforts of Chapman and Brown to develop the project.

> "Prudential quickly realized that it would not be possible to obtain firm commitments from users of petrochemicals to purchase products of the facility before it was built. (Tr. 629) They then tried to

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* After having heard all of the testimony upon which plaintiff relies to identify its alleged concepts, the Court was compelled (Tr. 1103) to ask plaintiff's counsel to state such concepts for the record. It is counsel's statement in response to the Court's query, *not* the statements of plaintiff's witnesses, which are paraphrased and on which plaintiff now attempts to rely. (Br. 6-7)

> recast the project to overcome this difficulty, but nevertheless convince EDA and the Department of the Interior that the project was not simply another refinery, which would not qualify for an import quota." (Br. 6)

As set forth in plaintiff's answering brief, the solution proposed by Prudential, to overcome the difficulties previously encountered, relied on two related concepts—first, "that instead of seeking previous commitments from a chemical user, the application be made and the core constructed before the establishment of satellites", and second, that "although the project be designed to produce a maximum amount of petrochemicals, it be sufficiently flexible to produce larger amounts of petroleum fuels, until users of petrochemicals be established around the core refinery". (Br. 6-7)

As thus presented by plaintiff, the utility of its concepts, and the question of whether Phillips in fact used such concepts, should be determined in this context, *i.e.*, whether Prudential's concepts "overcame the difficulty" which supposedly had frustrated earlier promoters of the third refinery project—their inability to obtain prior commitments from petrochemical users to establish satellite plants utilizing the products of the core facility—while at the same time convincing EDA and the Department of the Interior that the project was not just another refinery.

Considered according to this standard,—*i.e.*, whether Prudential's concepts made possible the solution of a specific problem under particular economic and political conditions—the record is overwhelmingly clear that plaintiff's alleged concepts played no part in the approval and establishment of the Phillips project and the grant of the oil import quota which was necessary for its project.

EDA's support of any third refinery project depended on the commitment of its sponsor to produce from the outset a significant amount of petrochemicals. For example, in his March 1962 letter to Texaco, EDA Administrator Durand made clear that EDA's support of any proposal for a third refinery complex in Puerto Rico would depend on substantial petrochemical p. ction by this new facility. (E-1792, Tr. 1975) Bruce Brown had come to the same conclusion during this period (E-294, 296; Tr. 1840) and even Mr. Shippee is very clear that the "last thing" Puerto Rico wanted in the early 1960's was an "additional gasoline refinery" (Tr. 1938).

Thus, the starting point of analysis is the fact—not disputed on this record—that in the early 1960's the Commonwealth of Puerto Rico did not want "another gasoline refinery" but would only support an oil import allocation for a facility committed to make substantial quantities of petrochemicals. The alleged necessity of prior commitments from petrochemical purchasers must be understood in this light. If an oil company which had no chemical experience and no established petrochemical markets were to make the politically necessary commitment to produce substantial quantities of petrochemicals, prior commitments from purchasers would be economically necessary in order to market the petrochemical products of the facility. However, as Bruce Brown recognized, and disclosed to Phillips in May 1962 (well in advance of Prudential's involvement in this project), an alternative would be to involve a company like Phillips—and rely on its established markets to sell the petrochemical products not initially consumed in Puerto Rico.*

* In contrast, without Phillips, or another company with established markets for petrochemical products, a prior commitment from a chemical user would be necessary, as noted in Bruce Brown's memorandum of May 9, 1962 (E-303, cited by plaintiff at p. 3 of its brief.)

Mr. Brown's May 16, 1962 letter to Phillips (E-294) noted that "since Phillips is both a refiner-marketer and a petrochemical manufacturer, it might have a dual interest in such a project." As Mr. Brown further explained his concept of Phillips' dual participation in such a project for Puerto Rico (Tr. 1797-98):

> A. It was my hope that since they [Phillips] were both a petroleum company, making ordinary petroleum products and petrochemicals, that they would be interested in putting up the major part of the money for a whole refinery which would produce petroleum products and petrochemicals.

Mr. Brown made clear that in the event of participation by Phillips as both a refiner-marketer and petrochemical manufacturer, prior commitments from petrochemical purchasers would be unnecessary (Tr. 1798):

> Q. . . . did you have any plan with respect to the disposition of the petrochemicals that might be produced from such a complex? A. No, because Phillips was producing the petrochemicals I had in mind in their U.S. refineries at that time and they knew more about how to dispose of them than I did.
>
> Q. Were you looking to Phillips to market the petrochemicals? A. Yes.
>
> Q. And they were an established marketer of petrochemicals as of that time? A. They were."*

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* In view of Prudential's claim that its concepts represented a solution to the problem which Bruce Brown had been *unable* to resolve, Mr. Brown's pre-trial testimony on this point is also pertinent.

When asked "what role or roles did you visualize as possible for Phillips at that time [May, 1962]?" (p. 87), Brown replied: "As a refiner-marketer and as a petrochemical manufacturer, I thought they might take the whole lead since Murphy [Oil Corporation] was will-

The Phillips project followed the course suggested by Bruce Brown in May 1962—well in advance of any participation by Prudential—an approach in fact indicated by Phillips' own prior experience in its Sweeney, Texas facility. (Tr. 1865; 1868) Phillips' project did not depend on prior commitments from petrochemical purchasers. This was not because, as Prudential suggests, purchasers were unnecessary to the realization of the project, but rather because the petrochemical products would be marketed by an integrated oil and petrochemical company like Phillips—relying on its own established markets and petrochemical experience.

The other related "concept" of Prudential, that the core plant would be established before the satellites, similarly had no role in Phillips' project. The decisive appeal of any core petrochemical facility to the Puerto Rican government was its promise for further investment and the generation of employment opportunities on the Island. (E-550) The Puerto Rican government did not—as suggested by Prudential—agree to an intial commitment to establish only a central core plant, leaving the investment in satellites to the indefinite future. Rather, EDA drove a hard bargain

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ing to be a partner. They [Phillips] were unlike Hercules [Powder Company] who had no petroleum business and unlike most petroleum companies that didn't have petrochemical business. *This was an exception and the right kind of exception for this project.*" (pp. 87-88, emphasis added).

During examination by plaintiff's counsel, Mr. Brown was asked,

> Q. "Now you testified earlier today that one of the reasons you thought of Phillips as being interested in this project is that it is in the petrochemical business as well as the petroleum, is that correct? A. Yes.
>
> Q. And the point of that would be you would *not need to line up more than one company?* A. *That is right.*" (pp. 133-34, emphasis added).

under which Phillips was required to invest a minimum of $55 million, and all of its profits from the core facility in the first 10 years of its operation, in satellite plants in Puerto Rico. (E-901-03, 905) It was this substantial commitment to Puerto Rico—not Shippee's indefinite hope of establishing satellites at some later date—that proved decisive in gaining EDA's approval of the Phillips project.

The other Prudential "concepts" are so internally contradictory—and/or evidently banal—that they cannot conceivably justify the very substantial award in the court below. As pointed out in our main brief, Prudential's witnessess were in complete disagreement concerning the nature of Prudential's alleged concept of a right of first refusal with respect to the products of the facility (Br. 35-36; Tr. 671). Further, Shippee's quasi-public utility concept—under which EDA "would undertake to make good [the] loss" of the promoter (Tr. 202-203)—is conspicuously absent from Phillips' project—in which Phillips has invested $167 million of its own money—and sustained a net loss of $135 million on a satellite investment made pursuant to its contract with EDA* (Tr. 1649, 1660-61), for an overall loss on its Puerto Rican project of $25 million. Of course, not one dollar of this loss has been "made good" by EDA, as Mr. Shippee's concept (Tr. 202-203) would require. In view of this substantial loss on the overall project, it appears ironic—as well as unfair—that Phillips is now required to pay Prudential more than $2.5 million, on the premise that Phillips used Prudential's quasi public-utility concept of a guaranteed investment.

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* Far from being a "separate investment" by Phillips in a satellite plant (plaintiff's brief, p. 30), such an investment—as an integral part of Phillips' initial commitment (E-905) to the core project—is the very thing which differentiates the Phillips proposal from Prudential's indefinite concepts.

The development of Prudential's "concepts"—which supposedly underlie the verdict in the court below—was aptly summarized by Prudential's President, Mr. Willey: "I think I was able to do the whole thing in a matter of minutes. It was just a concept." (Tr. 633)

A final perspective on Prudential's concepts is that of Shippee's Mohawk deposition testimony of December 28, 1965. According to Mr. Shippee, "[a]ll of my work was to take and develop situations into operations and I took a situation in Puerto Rico to develop a chemical industry for the Commonwealth, and I negotiated with the governor and I had a franchise to do this. . . ." (Tr. 518, E-1814)

Mr. Shippee further testified that following his airplane accident, "[t]he negotiations, which I was controlling, grounded [sic] to a halt, and other interested parties, essentially the Commonwealth of Puerto Rico, in my absence, turned in other directions and completed it without me." (Tr. 521, E-1817)

There is no claim or suggestion in this testimony, given within 10 days of the public announcement of the grant of the oil import quota for Phillips' Puerto Rican project, that Shippee developed or contributed any "concepts" to the Puerto Rican project. Rather, as he testified, he attempted to act as a promoter and operator—and in his absence "the other interested parties, essentially the Commonwealth of Puerto Rico . . . turned in other directions and completed it without me." (Tr. 521, E-1817)

As set forth above, the record establishes the fundamental difference between Prudential's "concepts" and the approach actually followed by Phillips—Prudential's "concepts" sought to *avoid* commitments to produce at the outset substantial quantities of petrochemicals and any requirement that the promoter establish satellite facilities

around the core; Phillips' proposal, in contrast, was bottomed on these very commitments to produce at the outset substantial quantities of petrochemicals and to make substantial investments in satellite facilities. (E-901-03, 905)

For the reasons considered above, and in our main brief (pp. 30-39), we submit that the record provides no competent support for the verdict below—premised on the actual use by Phillips of concepts developed by Prudential—and that the Court's denial of Phillips' motion for a new trial was erroneous and should be reversed.

POINT III

The Award of Interest from December 16, 1963 is Unjustified under New York Law and the Facts of this Case

Plaintiff's proffered justification for the amount of the award of pre-judgment interest is predicated on a series of erroneous characterizations of Phillips' legal argument.

First, contrary to plaintiff's assertion, Phillips does not oppose the award of pre-verdict interest because the amount of Prudential's damages remained *unliquidated* until the rendering of the jury's verdict on January 27, 1976 (Br. 33). Rather, Phillips contends that Prudential was not in fact *damaged*—by the deprivation of money or its equivalent—at any time earlier than January 1, 1970, the date when Phillips first earned a profit on its Puerto Rican facility. (E-1693-94) Under CPLR § 5001(b), "the statutory test is not the date of breach but rather the date the loss or damage was actually incurred." *Gelco Builders* v. *Simpson Factors Corp.*, 60 Misc. 2d 492, 493-494 (Sup. Ct. N.Y. 1969). Similarly, if the verdict is viewed as founded on the misappropriation of business concepts, interest should be

measured, not from the date of misappropriation, but from the date when lost profits upon the misappropriated business information might have accrued. *Delong Corp.* v. *Morrison-Knudsen Co.*, 14 N.Y.2d 346 (1964).

Plaintiff's asserted justification for the amount of the jury's verdict—that in determining damages flowing from misappropriation of trade secrets, "the finder of fact is entitled to consider the profit or advantage gained by the defendant in the use of the information" (Br. 30)—in fact supports the date of January 1, 1970 as the earliest appropriate point from which to measure interest. The jury was instructed that it might "award that portion of the profits or value of the ultimate project" it found attributable to the contribution of plaintiff. (Tr. 2263) *See* Phillips' Brief, pp. 46-47. Since Phillips did not earn any profit on its Puerto Rican project until January 1, 1970 (and plaintiff makes no contention that it independently could have earned a profit of the project before that time (Tr. 513-21), New York law requires that interest be awarded only from the date that such actual damages by Prudential were incurred. *See* Phillips' Brief, pp. 45-50.

For the above reasons, and contrary to plaintiff's assertion (Br. 32), Phillips does *not* seek to "negotiate a long term payout" for Prudential's concepts. Whether the verdict is viewed as founded on misappropriation or an implied-in-fact contract, the controlling question is when damages were *incurred*. The jury fixed the date of taking, *not* the date of damages, and it surpasses all rational sense of proportion and fairness to conclude that anyone would have paid plaintiff $1.5 million for its rudimentary and untested "concepts" in December 1963.*

* In contrast, Phillips in December 1963 had paid only $12,500 to its counsel Oscar Chapman and $2,000 to its consultant Jack Coan. (Tr. 1489-1490)

Finally, in determining the appropriate award of pre-judgment interest, we ask this court to recognize that this case has been fought for nine years, not to determine the value of plaintiff's alleged business concepts, but to determine the nature of the joint venture relationship, if any, between plaintiff and Phillips. In consummate understatement, plaintiff admits in its answering brief that "it is, of course, true that plaintiff tried to show a joint venture." (Br. 31) In fact, until the day before plaintiff's joint venture claims were finally dismissed, plaintiff vigorously urged that the record did not support an implied-in-fact contract to pay for business concepts. (Tr. 1235) *See* Phillips' brief, pp. 30-31. And as we have noted, Shippee's Mohawk testimony—fatally destructive of the claim of joint venture on which this litigation so long centered—was withheld by him throughout this lengthy proceeding.

In view of all the foregoing, there is no reason on the present record to extend to plaintiff the "benefit of the doubt" in determining the appropriate date for measuring pre-verdict interest for the supposed use of its business concepts. Rather, it is fully in accord with New York law, as well as the underlying equities of this case, to measure interest from a date *no earlier* than January 1, 1970.

Conclusion

For the above reasons, and the reasons considered in our main brief, dated July 12, 1976, the jurisdiction of the District Court—which plaintiff invoked through the collusive and improper assignment of its claims against defendant—cannot be sustained. Even if the jurisdiction of the District Court is sustained, the verdict below is without

competent support in the record, and a new trial is accordingly warranted. If, however, the verdict is allowed to stand, the calculation of pre-judgment interest must be corrected.

Dated: New York, New York
September 16, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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PRUDENTIAL OIL CORPORATION, :

Plaintiff-Appellee, :

-against- : Docket No. 76-7207

PHILLIPS PETROLEUM COMPANY, :

Defendant-Appellant.: :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell, attorneys for Defendant-Appellant; that on the 16th day of September, 1976 he caused the within Reply Brief to be served upon Gold, Farrell & Marks, attorneys for Plaintiff-Appellee by having two true copies of the same delivered to said attorneys at 595 Madison Avenue, New York, N.Y. 10022, by leaving the same with a person in charge of said office.

George A. Scholze

Sworn to before me this
16th day of September, 1976

Eileen L. Franklyn
Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, State of New York
No. 31-1303130
Qualified in New York County
Commission Expires March 30, 1977